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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MAXELL, LTD.)
) DOCKET NO. 5:16cv179
-vs-)
) Texarkana, Texas
) 8:32 a.m.
ZTE USA, INC.) June 19, 2018

TRANSCRIPT OF TRIAL
MORNING SESSION
BEFORE THE HONORABLE ROBERT W. SCHROEDER III,
UNITED STATES DISTRICT JUDGE,
AND A JURY

A P P E A R A N C E S

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P R O C E E D I N G S

(Jury out.)

THE COURT: Good morning, everyone.

MR. FINDLAY: Good morning, Your Honor.

MR. CULBERTSON: Good morning.

THE COURT: I know the parties have a number of objections they want to raise before we do preliminary instructions and openings.

Who would like to be heard?

MR. FINDLAY: Good morning, Your Honor. Eric Findlay on behalf of ZTE USA.

Ms. Bjurstrom will handle the specific objections to the slides.

More from an overview issue and concern that we had and perhaps clarification, we understand that Your Honor has ruled on the Motion in Limine No. 4, specifically the 408 and the NDA. This may just be reiterating the objection for the record, Your Honor, but I think it is sincerely putting us in a really difficult situation.

If I understand the Court's ruling, part of the rationale was that Maxell is entitled to disclose its confidential information, what it did, but all of what it's going to disclose and talk about, I believe, beginning in opening statements, are things which happened under these 408 discussions with ZTE.

1 So it puts us in, I think, a kind of classic
2 catch-22. We can't be compelled to disclose our 408 exchange
3 that we had with them. They are not at liberty, from what I
4 understand, so far the Court has ruled, to force that out or
5 to put that out there. It's our choice.

6 And so, as I say, I think it puts us in a catch-22
7 where either we remain silent, and it looks like we didn't
8 respond to anything they had to say and just, you know,
9 closed our hands and closed our mouths and walked away, or
10 we're into this situation where now we've got to disclose all
11 the things and all the discussions and all of the information
12 we exchanged, which we believed at the time, and I think
13 was -- there's no question -- covered by, one, the NDA and
14 then would be protected under FRE 408.

15 And I think that really puts a chilling potential
16 impact on these sorts of pre-suit settlement negotiations.
17 Normally, when those happen, they're successful. Not always.
18 Here we ended up in court; they weren't successful. But I
19 think it really puts a chilling effect on folks engaging in
20 those.

21 THE COURT: The parties negotiated this
22 nondisclosure agreement at arm's length, correct?

23 MR. FINDLAY: Yes, sir.

24 THE COURT: Okay. Well, I mean, I just don't --
25 you know, it seems to me -- let me hear from the Plaintiff on

1 this.

2 MR. FINDLAY: Thank you, Judge.

3 MR. LEVY: Your Honor, first, I think you hit the
4 nail on the head. The parties negotiated the NDA. There are
5 provisions in the NDA for this. So that's first.

6 Second, you know, the claim of prejudice is a
7 little disingenuous because, on the one hand, they're
8 claiming, hey, we didn't know about these patents until the
9 complaint was filed or, you know, there's no willfulness
10 here.

11 On the other hand, when there's evidence of notice
12 or awareness or willfulness, then they say, oh, you can't
13 bring that in because -- you know, because it puts us in a
14 bad situation.

15 The parties negotiated the NDA. It's pretty clear.
16 The case law is pretty clear that this information could come
17 in for things like notice. The Defendant has certainly put
18 things like notice and awareness of the patent and whatnot at
19 issue by, you know, making certain -- taking certain
20 positions that are contrary to what these documents show.

21 So, ultimately --

22 THE COURT: As I understand it, Mr. Levy, the terms
23 of the NDA only restrict Maxell's use of ZTE's information
24 and ZTE's use of Maxell's information, correct?

25 MR. LEVY: Yes, Your Honor.

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